



WASHINGTON STATE  
DEPARTMENT OF  
E C O L O G Y

# Water Resources Program Rule Making

*Stephen Hirschey*  
*Water Resources Program*  
*January, 2001*

# Mission

*Meet current and future  
water needs for people,  
farms and fish*



# What is a Permit?

A permit to appropriate water is--

- an inchoate (undeveloped) right,
- which is “an incomplete appropriative right in good standing”
- which “remains in good standing so long as the requirements of law are being fulfilled.”

*after Hutchins*



# **What are Permit Conditions?**

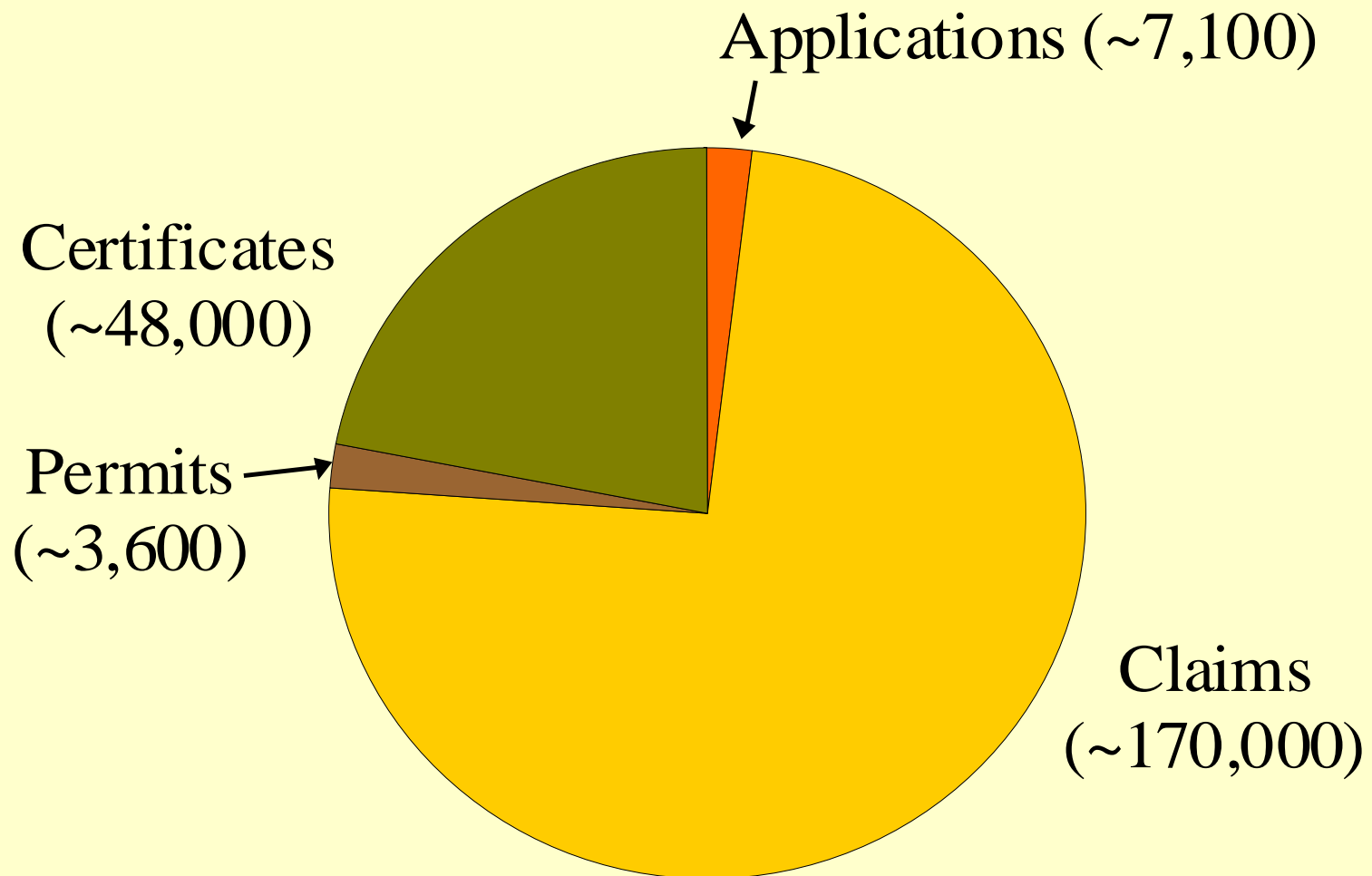
- **Reasonable progress**
- **Due diligence**
- **Construction and use of water**
- **Permit conditions promote public welfare**

# What is a Certificate?

**Awarded when the water right holder:**

- **beneficially uses the**
- **amount of water permitted at**
- **the location identified**
- **for the intended purpose.**

# Current Water Rights



# New Water Rights Permits

Ecology must determine:

- Use is beneficial
- Water is available
- Existing water uses are not impaired
- Not detrimental to public welfare



# Changes to water rights

## Ecology must determine:

- Water right developed and maintained by beneficial use
- Change will not impair existing rights
- Change is not detrimental to public welfare

# Water Rights ‘P’s & Q’s’

**P’s ~**

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**point of diversion**  
**purpose of use**  
**place of use**  
**priority date**

**Q’s ~**

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**“Qa” = annual quantity**

**“Qi” = instantaneous quantity**

# What is a Rule?

*A "RULE" IS:* An Order,  
Directive, or a Regulation of  
General Applicability

Rules do not change statutory or case law

- “Administrative rules or regulations cannot amend or change legislative enactment’s.” *Theodoratus*



# Proposed Water Right Administration Rule

- Incremental rule making
- Proposal focused on issues raised by *Theodoratus* decision



# Theodoratus

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- Court case on the extension of a permit
- "Pumps and pipes" vs actual water use to describe water right attributes

# Ultra Vires

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“Without the authority of law”

State statutory and common law does not allow final certificate of water right to be issued based on system capacity.

# Left or Right at the T?

*(Ecology Response to George T Decision)*

## WHO:

- 10,000 certificates  
municipal/community domestic
- 197 public water systems serve 90%  
population (@1000 certificates)
- other 9000 certificates ~smaller systems

# Ultra Vires Certificates

- Ecology issued certificates based on “pumps and pipes”
- Water never put to beneficial use
- Supreme Court: Ecology acted illegally
- Beneficial use is measure of water right
- Status of water rights now unclear



# Scope of rule making

- Scope of rule making is not final
- Workshops to discuss draft concepts, scope



# Schedule

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- Workshops, January 2001
- Draft rule language, February/March
- Public hearings, Spring 2001
- Adopt final rule, Summer 2001

# Proposed language may address:

- Showing of perfection
- Administrative order to correct errors
- Administrative order to recognize underlying authorized water use
- Permit extension pursuant to RCW 90.03.320

# Permit Development

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- Development schedule
- Request to extend a permit
- Decision on extension request
- Permit cancellation if necessary

# Proof of Appropriation

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- What is proof of appropriation?
- How is it demonstrated?
- What does the state do?



# Correcting Errors

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- Ministerial errors
  - changes do not change attributes of right as used or understood
- Substantial errors
  - changes may change attributes of right as used or understood



# Water Right Permit

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- Recognize any inchoate right
- Reaffirm attributes of right

# **The Challenge?**

## **Old Water Code vs. New Demands**

- Fit Water Code and case law into decisions
- Provide predictability and clarity
- Provide certainty